No. 16732

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL HOD CARRIERS', BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL 300, AFL-CIO, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*),[1] for enforcement of its order against the International Hod Carriers' Building and Common Laborers' Union of America, Local 300, AFL–CIO (herein called the Union), on May 20, 1959, following the usual proceedings under Section 10 of the Act. The Board's decision and order (R. 27–30)[2] are reported at 123 NLRB 1231. This Court

[1] The relevant statutory provisions are reprinted, *infra*, pp. 16–19.

[2] Reference to the printed record are designated "R." In a series of references, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

has jurisdiction of the proceedings, the unfair labor practices having occurred in the area of Los Angeles, California, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly stated, the Board found that respondent violated Section 8(b) (2) and (1)(A) of the Act by causing Martin Brothers, an employer, to discharge employees Monico C. Garcia and Jesse Gallego for their failure to adhere to respondent's internal rules governing job referral. The Board also found that Martin Brothers' operations affect commerce within the meaning of the Act and that it would effectuate the purposes of the Act to assert jurisdiction in this case. The facts upon which these findings rest are summarized below.

A. The Operations of the Employer

The employer, Martin Brothers, is a partnership engaged in lathing and plastering contracting in the Los Angeles area, and employs both laborers and plaster tenders (i.e., hod carriers). The firm belongs to the Contracting Plasterers' Association of Southern California, Inc., which negotiates and signs association-wide collective bargaining agreements on behalf of its 326 members (R. 13, 42, 44). The Union has such a contract with the Association covering plaster tenders but has no contract with it covering laborers (R. 17–18; 42, 55).[3]

[3] The Union has a contract with a number of other employer associations governing laborers (R. 62–63).

B. The Unfair Labor Practices

Martin Brothers has no fixed hiring policy with respect to laborers (R. 20; 54). It hires "at the gate," or upon the recommendation of other employees, and, on occasion, calls the Union hiring hall (*ibid.*).

Monico C. Garcia and Jesse Gallego on their own initiative went to Martin Brothers' Wilshire Terrace project on Friday, April 18, 1958, and were hired and worked that day as laborers (R. 15; 45, 59–60). Both were, and continued to be, members of the Union in good standing (R. 15; 45–47, 49). They reported for work on the next workday, Monday, April 21, but were not permitted to start (R. 15; 45–46, 60). Respondent's Assistant Business Agent, Dan Gomez, was on the scene and found out that Garcia and Gallego had obtained the jobs directly and did not have Union clearance (R. 15; 46–51, 52, 60). In the presence of the two men, Gomez told Foreman Arthur Sherman" * * * these men have to get off the job because they have no clearance for the job" (R. 15; 60). Sherman immediately instructed Garcia and Gallego to "* * * go down to the local and get a clearance and come back and they had a job from there on" (*ibid.*). As directed, Garcia and Gallego went to the Union hall and told Acting Field Manager D'Amico that they had jobs and needed clearance to go back to work (R. 15–16; 47–48). Clearance was denied them, however. It was explained that they would have to register and await their turn and that the Union had "already" sent two other men to Martin Brothers (R. 16; 48). Seven weeks after

the discharge, Garcia obtained employment at the Wilshire Terrace job, apparently pursuant to the Union's referral system (R. 16; 50). During this 7-week period he made two attempts on his own to get his job back but was turned down each time for lack of Union clearance (R. 16; 50).

II. The Board's conclusions and order

Upon the foregoing facts the Board concluded that respondent caused the discharge of Garcia and Gallego for non-compliance with union rules relating to job referral, that this discrimination encouraged Union membership, and that respondent had, therefore, violated Section 8(b) (2) and (1)(A) of the Act (R. 20–21, 28). The Board also found that it had jurisdiction over respondent and that it would effectuate the purposes of the Act to assert jurisdiction in this case (R. 14, 21).

The Board's order requires respondent to cease and desist from engaging in the unfair labor practice found, and from in any other manner restraining or coercing employees in the exercise of the rights guaranteed them by the Act. Affirmatively, the order directs respondent to make Garcia and Gallego whole for any loss of pay resulting from the discrimination, to notify Martin Brothers and the two men, in writing, that it withdraws its objection to their employment, and to post appropriate notices (R. 28–30).

ARGUMENT

I. Substantial evidence on the record as a whole supports the Board's finding that respondent violated Section 8(b) (2) and (1)(A) of the Act by causing Martin Brothers to discharge employees Garcia and Gallego

The facts set forth, *supra,* pp. 2–4, establish that Garcia and Gallego would have continued to work for Martin Brothers if Union Representative Gomez had not told Company Foreman Sherman that the two men had "to get off the job" because they did not have "clearance" from the Union, and if the Union had not then refused to give them clearance.[4] While it is true that an employer and a union may, under appropriate circumstances, enter into a lawful hiring agreement, the record amply supports the Board's finding that the Union had *no* contract with Martin Brothers. And respondent's answer to the Board's

[4] Respondent apparently referred members, at least, in rotation, *supra*, p. 3. However, Union Field Manager D'Amico testified on direct examination as follows with respect to a conversation with one of the Martins at a different project (Tr. 126, 146):

"A. About two weeks before this case. I told him, I says, 'Here we go again.' I says, 'Now you have got this laborer here, we just took one off another job. Now you have got this man.' * * * Well, I said, 'Here is a man, they don't belong to the union, working with the latherers. Now you are violating your agreement again.'

On cross-examination D'Amico testified as follows with respect to the same incident (Tr. 146):

Q. This Tidewater situation, that involved the plaster tenders didn't it?

A. No, the laborers. I had gone over there for a jurisdiction dispute, for, with the plasterers, and while I was walking down, I noticed the lathers was working, and I seen this laborer and I asked him to show me his book."

petition for enforcement appears to concede that the Board's finding that its action violated Section 8(b)(2) and (1)(A) of the Act is proper unless the Union had a valid hiring agreement with Martin Brothers (R. 38). Cf. *N.L.R.B.* v. *International Association of Machinists, etc., Local Lodge 758, AFL–CIO,* (C.A. 9), 46 LRRM 2465, 2468 (June 4, 1960); *Morrison-Knudson, Inc.* v. *N.L.R.B.,* 270 F. 2d 864, 865 (C.A. 9). See also, *Radio Officers' Union* v. *N.L.R.B.,* 347 U.S. 17, 42; *N.L.R.B.* v. *Local 542, Operating Engineers,* 255 F. 2d 703, 704–705 (C.A. 3); *N.L.R.B.* v. *Brotherhood of Painters, Local 419,* 242 F. 2d 477, 481 (C.A. 10).

Respondent's contention is that it had a valid contract with Martin Brothers which required the latter to hire exclusively through the Union, that the Company violated that contract when it hired the two men directly, and that the Union's demand that they be discharged was therefore lawful. However, as we demonstrate below, the Board properly concluded that the Union had *no* hiring agreement with Martin Brothers at the time of the events here in issue.

Concededly, in 1946, W. L. Martin (a partner in Martin Brothers) signed "Articles of Agreement" with the Building and Construction Trades Councils of which the Union is a member (R. 66–68). At that time W. L. Martin was doing business as an individual and was engaged in general contracting, which required him to hire laborers as well as other craftsmen. On the other hand, Martin Brothers is a partnership and is engaged exclusively in lathing and plastering (R. 53, 57). The Articles, consisting of six

paragraphs, apply to "all work" which comes within the jurisdiction of the Trades Council (R. 66). The second paragraph provides in pertinent part that (R. 66):

> The Contractor does hereby agree * * * that he will employ * * * upon all work * * * in the jurisdiction of said Councils and their affiliated Unions, only members in good standing in the organization to which said work properly belongs in accordance with the wage scales, classifications and working rules of the Union having jurisdiction.

The final paragraph provides for automatic renewal every year unless one of the parties gives written notice of its intent to terminate or amend the agreement (R. 68). Admittedly, W. L. Martin, who signed the Articles in 1946, has never given the Trades Councils notice of his intent to terminate them (R. 68).

This "short form" agreement, respondent contends, "incorporates" the master agreement entered into between the Associated General Contractor (herein called AGC), and the Trades Councils and therefore binds Martin Brothers to abide by the terms of the AGC agreement in effect at any given time, including the requirement that the employer hire only through the Union. The Articles, however, contain no reference to any other agreement. In fact, the only references to matters not set forth therein are not to an AGC agreement but (1) to "wage scales, classifications, and working rules *of the Union* having jurisdiction" (R. 66, emphasis supplied), and (2) to the Company's duty to com-

ply with the "requirements *of the Council and its affiliated Unions*" for clearing workmen (R. 66–67, emphasis supplied).

Furthermore, neither W. L. Martin nor Martin Brothers has ever been a member of AGC (R. 56). W. L. Martin testified that he was "obligated to sign" the Articles in 1946 because he was not a member of AGC and he "signed [it] for that particular term of the contract, not for any subsequent contract in later years" (R. 56). His explanation was that he needed such an agreement at that time because he was doing some general contracting work for the Government (R. 57). Accordingly, in his view Martin Brothers did not have a contract with the Union with respect to laborers at the time of the events here in issue (R. 55).

But, respondent points out, Martin Brothers pays its laborers union wages and has made contributions to their health and welfare fund provided for in the AGC-Trades Council contracts since 1955 (R. 56). These facts, it argued before the Board, prove that the Company "felt obligated" to follow the AGC contract. This argument ignores the possibility that the Company could well consider it good labor relations to pay union rates and grant other benefits to its laborers, who work alongside its plaster tenders who are covered by a union contract. The Union, on the other hand, would very likely be willing to accept voluntary payments to a fund from which so many of its members would benefit. Furthermore, the record indicates that the Union itself did not consider that the 1946 Articles automati-

cally bound Martin Brothers to make payments to the fund set up in the 1955 AGC contract. Thus, respondent's witness D'Amico, testified that the date "4.5.55" appearing on the Union's records with respect to contributions to the laborers' health and welfare fund, refers to "when [Martin] signed the agreement to pay" into the fund and that the Union would not have sent the Company the "forms" if the latter had not called. Although the Union was unable to find the agreement signed by Martin in 1955, in D'Amico's words, Martin "must have had an agreement in 1955 * * * the dates are there and we we can't lie about dates." [5]

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[5] D'Amico testified (Tr. 105–110):

By Mr. SCHULLMAN:

Q. Now, I show you a similar paper or document marked for identification R–10, on top it says contractors' status, 10–23–58, and ask you if you are familiar with that?

A. Yes.

Q. And on that page, approximately 20 lines from the bottom, where somebody has marked with ink, does the name Martin Brothers appear?

A. Yes.

Q. Can you tell us what this document represents?

A. That represents the laborers. He has been paying health and welfare on the laborers on this one, and he signed it.

Q. Then it has 4–5–55, with the word "Eff" on top?

A. That is right.

Q. "Eff" is what?

A. Means effective, when he signed the agreement to pay the health and welfare.

VOIR DIRE EXAMINATION

By Mr. GRODSKY:

Q. Do you have here whatever document Martin Brothers signed in May of 1955 that is referred to in Exhibit R–10?

But even if it is assumed that respondent either believed that the 1946 Articles bound Martin Brothers to abide by the AGC-Trades Council contract in effect in 1958, or that respondent chose to so interpret the Articles, neither assumption has substantial probative value in determining the issue here, *i.e.*, whether the Articles signed by W. L. Martin in 1946 provide the Union with a defense to its otherwise illegal action in 1958.

In sum, we submit that the Board properly found that respondent had no contract in 1958 with Martin

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A. When Martin Brothers called us to send, you know, to pay his health and welfare, we called him on it verbally. We took the old agreement that he had with the building trades, and put him, took that as an agreement he had with the short form, and we sent him the papers there.

FURTHER DIRECT EXAMINATION

By Mr. SCHULLMAN:

Q. Let me ask you that, in other words, Mr. D'Amico, you did speak to him in 1955?

A. That is right. We could never send him the forms, if he didn't call us.

Q. He called you for the forms; when you use the word forms, you mean the current master agreement?

A. That is right.

Mr. GRODSKY. Who has that agreement, if there is one that has been signed?

The WITNESS. Well, at that time we had another office. Our administrator was a fellow named Cornell, and we have changed administrators since, and we are under this other fellow, fellow named Chaque, Mr. Chaque, and he is our administrator now.

The records they had out of this fellow named Mr. Cornell seems that we haven't been able to find them. We have been looking for this agreement. He must have an agreement in 1955. We wouldn't have had it in, see, the dates are there and we can't lie about the dates.

Brothers which required the latter to hire laborers exclusively through the Union, and properly concluded that, therefore, it violated Section 8(b) (2) and (1)(A) of the Act by causing Martin Brothers to discharge Garcia and Gallego because they had not complied with the Union's unilateral hiring rules.[6]

II. The Board properly asserted jurisdiction over respondent

As set forth, *supra,* p. 2, Martin Brothers employs both plaster tenders and laborers. It is one of 326 members of the contracting Plasters Association of Southern California, Inc., which bargains for and signs association-wide collective bargaining contracts covering plaster tenders on behalf of all of its members, including Martin Brothers, with numerous unions, including respondent. In the year ending July 30, 1958, one of the other Association members (A. E. Eiden and Sons of Los Angeles), performed work in Colorado valued at more than $600,000 (R. 13–14; 43–44). Respondent conceded before the Board that because of the Company's membership in the Association, the Board would have jurisdiction in a case involving the plaster tenders employed by Martin Brothers. It argued, however, that the Board did not have jurisdiction in this case because the men involved were laborers and the Association did not bargain with the Union with respect to laborers. This contention is without merit.

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[6] Should the Court disagree with the Board's finding that the Union had no contract with Martin Brothers covering the latter's laborers, we respectfully submit that the case should be remanded to the Board for it to determine whether, as respondent contends, the contract contained a valid hiring clause.

In the first place, the question of whether the Board has jurisdiction under the Act does not turn upon whether the parties have chosen to bargain with respect to the employees involved. In the second place the contention ignores the fact that Martin Brothers' laborers work side by side with its plaster tenders under the same foreman and both belong to the respondent Local (R. 58–59). Under these circumstances, it is apparent that a dispute involving laborers would immediately and directly affect the work of the plaster tenders. We submit that it would be both illogical and contrary to the purposes of the Act to conclude that the Board has jurisdiction over an employer with respect to part of his employees, but not as to others, particularly in a case in which they all work together in an integrated operation.

In *Virginia Electric and Power Company* v. *N.L.R.B.*, 115 F. 2d 414 (C.A. 4), the Company conceded that the Board had jurisdiction over its electrical business but argued that its gas and transportation businesses were "local" and beyond the Board's jurisdiction. As the court said, "A sufficient answer to this position is the unitary character of the Company's business * * * notwithstanding the division into * * * departments * * *. It is clear that wage controversies or unfair labor practices in any department of such a business will have repercussions in other departments * * *" (*Id.* at pp. 415–416). Although the Company did not raise the jurisdiction issue before the Supreme Court, the latter noted that it had been "correctly decided" by the court below.

314 U.S. 469, 476. *A fortiori* the Board properly asserted jurisdiction in this case in which the two classifications of employees work together in an integrated operation.

In short, as the Board pointed out in *Harlan B. Browning,* 120 NLRB 841, 841–842, enforced 268 F. 2d 938 (C.A. 10), it would be anomalous if some of a single employer's ordinary employees are protected by the Act while others are not. It should be remembered that in enacting the National Labor Relations Act "* * * Congress explicitly regulated not merely transactions or goods in interstate commerce, but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce * * * [and] left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress." *Polish National Alliance* v. *N.L.R.B.,* 322 U.S. 643, 648. The realities of the economic situation presented here indicate that the Association's substantial interstate dealings could well be affected adversely by labor disputes with the laborers and that the impact on commerce cannot be compartmentalized on the basis of whether the employees involved are covered by a contract. We submit, therefore, that the Board has jurisdiction in this case.

Furthermore, as the Board has said, the "clear effect of * * * [Association-wide] bargaining is the establishment of a relationship whose impact on commerce reaches beyond the confines of any one em-

ployer involved in the joint bargaining and is coextensive with the totality of the operations of all the employers so involved." *Vaughn Bowen,* 93 NLRB 1147, 1150, quoted with approval by the Court in affirming the Board's assertion of jurisdiction in a similar situation. *N.L.R.B.* v. *Gottfried Baking Co.,* 210 F. 2d 772, 778 (C.A. 2). As the Second Circuit also noted, this Court has also upheld the Board's assertion of jurisdiction on the same basis. See *Leonard* v. *N.L.R.B.,* 197 F. 2d 435, 436, n. 1, in which there was no evidence that any individual company engaged in commerce in sufficient volume to give the Board jurisdiction over it standing alone. Cf. *Joliet Contractors Association* v. *N.L.R.B.,* 193 F. 2d 833, 839–840 (C.A. 7), in which the Court reversed the Board's dismissal of a complaint on jurisdictional grounds and ruled that the Board should have considered the "totality of the situation" rather than merely viewing the activities of each individual company in isolation.

Respondent also appeared to contend before the Board that even if the Board has jurisdiction, its decision to exercise it in this case was improper. This Court has pointed out, however, that this question is for the Board, not the Courts, to determine and is not justiciable, absent evidence, which is lacking here, that the Board's action constitutes "unjust discrimination." *N.L.R.B.* v. *Jones Lumber Company, Inc.,* 245 F. 2d 388, 390–391, n. 7.

CONCLUSION

For the foregoing reasons we respectfully submit that a decree should issue enforcing the Board's order in full.

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JULY 1960.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 73 Stat. 519, 29 U.S.C., Secs. 151 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court

of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record

considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

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